

1 KAREN P. HEWITT  
 2 United States Attorney  
 3 PETER J. MAZZA  
 4 Assistant U.S. Attorney  
 5 California State Bar No. 239918  
 6 United States Attorney's Office  
 7 880 Front Street, Room 6293  
 8 San Diego, California 92101-8893  
 9 Telephone: (619) 557-5528/(619) 235-2757 (Fax)  
 10 Email: peter.mazza@usdoj.gov

11 Attorneys for Plaintiff  
 12 United States of America

13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF CALIFORNIA

|                              |   |                              |
|------------------------------|---|------------------------------|
| 15 UNITED STATES OF AMERICA, | ) | Case No. 07CR3190-JAH        |
|                              | ) |                              |
| 16 Plaintiff,                | ) | DATE: March 10, 2008         |
|                              | ) | TIME: 8:30 a.m.              |
| 17 v.                        | ) | Honorable John A. Houston    |
|                              | ) |                              |
| 18 JOSE REYMUNDO             | ) | UNITED STATES' RESPONSE AND  |
| CONTRERAS-HERNANDEZ,         | ) | OPPOSITION TO DEFENDANT'S    |
|                              | ) | MOTION TO DISMISS THE        |
| 19 Defendant.                | ) | INDICTMENT DUE TO AN INVALID |
|                              | ) | DEPORTATION                  |
|                              | ) |                              |
|                              | ) | TOGETHER WITH STATEMENT OF   |
|                              | ) | FACTS AND MEMORANDUM OF      |
|                              | ) | POINTS AND AUTHORITIES       |
|                              | ) |                              |

20 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and  
 21 through its counsel, Karen P. Hewitt, United States Attorney, and  
 22 Peter J. Mazza, Assistant U.S. Attorney, and hereby files its  
 23 Response and Opposition to Defendant's above-referenced motion in  
 24 the above-captioned case. Said Response is based upon the files  
 25 and records of this case together with the attached statement of  
 facts and memorandum of points and authorities.

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1 DATED: March 3, 2008.

2 Respectfully submitted,

3 KAREN P. HEWITT  
4 United States Attorney

5 s/ Peter J. Mazza  
6 PETER J. MAZZA  
7 Assistant United States Attorney  
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KAREN P. HEWITT  
 United States Attorney  
 PETER J. MAZZA  
 Assistant U.S. Attorney  
 California State Bar No. 239918  
 United States Attorney's Office  
 880 Front Street, Room 6293  
 San Diego, California 92101-8893  
 Telephone: (619) 557-5528/(619) 235-2757 (Fax)  
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|                           | ) | Honorable John A. Houston      |
| v.                        | ) |                                |
|                           | ) |                                |
| JOSE REYMUENDO            | ) | UNITED STATES' STATEMENT OF    |
| CONTRERAS-HERNANDEZ,      | ) | FACTS AND MEMORANDUM OF POINTS |
|                           | ) | AND AUTHORITIES                |
| Defendant.                | ) |                                |
| _____                     | ) |                                |

I

**STATEMENT OF THE CASE**

On November 23, 2007, a federal grand jury in the Southern District of California returned a one-count Indictment charging Jose Reymundo Contreras-Hernandez ("Defendant") with Deported Alien Found in the United States, in violation of Title 8, United States Code, Section 1326. The Indictment further alleged that Defendant had been removed from the United States subsequent to October 28, 2005.

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## II

STATEMENT OF FACTS**A. THE INSTANT OFFENSE**

On October 27, 2007, United States Supervisory Border Patrol Agent Mark E. Noland was conducting assigned patrol duties in the Campo Border Patrol Stations area of operations. At approximately 3:00 a.m., Agent Noland responded to a seismic intrusion device located on a trail known to be used by illegal aliens to further their illegal entries into the United States. The seismic intrusion device is located approximately nine miles east of the Tecate, California Port of Entry and approximately 13 miles north of the United States/Mexico international boundary.

Upon arriving at the location of the seismic intrusion device, Agent Noland observed fresh footprints headed in a north-bound direction. Agent Noland followed the footprints north until he came upon a group of ten individuals attempting to conceal themselves. Agent Noland identified himself as an United States Border Patrol agent. He then questioned each individual regarding their immigration status. All ten individuals, including Defendant, stated that they were citizens and nationals of Mexico without any documents to allow them to enter or remain in the United States legally. Defendant and the other nine individuals were taken into custody and transported to the Campo, California Border Patrol Station.

At the station, Defendant's personal information was entered into immigration and criminal history databases. Defendant's

1 identity was confirmed, along with his criminal and immigration  
2 histories.

3 At approximately 3:00 p.m., Agents informed Defendant of his  
4 Miranda rights. Defendant invoked those rights. No questions  
5 were asked of Defendant.

6 **B. DEFENDANT'S IMMIGRATION HISTORY**

7 Defendant is a citizen of Mexico who was physically removed  
8 from the United States through the San Ysidro, California Port of  
9 Entry to Mexico on September 27, 2007.

10 **C. DEFENDANT'S CRIMINAL HISTORY**

11 Defendant was convicted of Solicitation to Commit Murder, in  
12 violation of California Penal Code Section 653f(b) by a California  
13 Superior Court in Santa Cruz, California on October 28, 2005. The  
14 Superior Court sentenced Defendant to six years in prison.

15 **III**

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 Defendant seeks to collaterally attack his underlying  
18 deportation. To do so, Defendant must show that 1) he exhausted  
19 all his administrative remedies available to appeal his removal  
20 order; 2) the underlying removal proceedings at which the order  
21 was issued improperly deprived him of the opportunity for judicial  
22 review; and 3) the entry of the order was fundamentally unfair.  
23 Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004). Such order  
24 would be fundamentally unfair if Defendant's due process rights  
25 were violated by defects in his underlying deportation proceeding,  
26 and if he suffered prejudice as a result of those defects. Id.

1           **A.     BECAUSE DEFENDANT WAS CONVICTED OF AN AGGRAVATED FELONY, HE**  
2           **CANNOT ESTABLISH THAT HE WAS PREJUDICED BY HIS REMOVAL**

3           In his motion to dismiss his Indictment, Defendant argues his  
4           2007 administrative removal was invalid for a variety of reasons.  
5           This Court need not reach all of these arguments, however, because  
6           Defendant cannot establish that he was in any way prejudiced by  
7           this removal, which Defendant must establish. See United States  
8           v. Corrales-Beltran, 192 F.3d 1311, 1316 (9th Cir. 1999).  
9           Prejudice can only be demonstrated if Defendant shows that he had  
10          plausible grounds for relief from deportation. United States v.  
11          Arce-Hernandez, 163 F.3d 559, 564 (9th Cir. 1998). Because  
12          Defendant had not plausible relief from deportation, his motion  
13          must fail.

14          Defendant is not eligible for "any relief from removal that  
15          the Attorney General may grant in the Attorney General's  
16          discretion." INA § 238(b)(5). He is an aggravated felon, which  
17          means he is conclusively presumed to be subject to removal and is  
18          ineligible for cancellation of removal, voluntary departure, and  
19          registration as a permanent resident alien. See United States v.  
20          Espinoza-Farlo, 34 F.3d 469, 471-472 (7th Cir. 1994). When we add  
21          to the obstacles imposed by virtue of that status the effect of 8  
22          U.S.C. § 1228(b)(5)'s exclusion of aliens removed under the  
23          expedited procedures from "any relief from removal that the  
24          Attorney General may grant in the Attorney General's discretion,"  
25          the absence of prejudice is deducible almost as a matter of law.  
26          See United States v. Garcia-Martinez, 228 F.3d 956, 963 (9th Cir.

1 2000) (holding that for alien convicted of aggravated felony and  
2 placed in expedited procedures under § 1228, removal is "foregone  
3 conclusion"); United States v. Benitez-Villafuerte, 186 F.3d 651,  
4 659 (5thCir. 1999) (same).

5 Under 8 U.S.C. § 1227(a)(2)(A)(iii), any "alien who is  
6 convicted of an aggravated felony at any time after admission is  
7 deportable." No alien deportable as an aggravated felon under  
8 that section "shall be eligible for any relief from removal that  
9 the Attorney General may grant in the Attorney General's  
10 discretion." 8 U.S.C. § 1228(b)(5). There simply is no way for  
11 Defendant to establish any prejudice because he was not eligible  
12 for any relief from deportation. See Garcia- Martinez, 228 F.3d  
13 at 964 (finding that defendant needed to show actual prejudice  
14 rather than "assumed" prejudice, and that defendant could not do  
15 so because the official removing him had no discretionary  
16 authority to grant relief from deportation in light of defendant's  
17 prior rape conviction).

18 Defendant nonetheless argues that "solicitation to commit  
19 murder in and of itself is not a crime of violence." (Def.'s  
20 Mot. 5.) This is simply incorrect. Title 8, United States Code,  
21 Section 1101(a)(43)(F) defines an aggravated felony as "a crime of  
22 violence (as defined in section 16 of Title 18, but not including  
23 a purely political offense) for which the term of imprisonment  
24 [is] at least one year." Section 16 of Title 18 in turn defines a  
25 crime of violence as:

26 (a) an offense that has as an element the use,  
27 attempted use, or threatened use of physical force





1 because it employed the Taylor categorical analysis it did not  
2 matter that Ng had contracted with a government informant who had  
3 no intent to carry out the murder. Id. The court stated that  
4 despite that "some violations of § 1958 will never culminate in an  
5 actual agreement or the commission of a murder does not alter our  
6 view that the natural consequence of . . . a murder-for-hire is  
7 that physical force will be used upon another." Id.

8 The Ninth Circuit similarly concluded that a conviction for  
9 solicitation to commit murder is a crime of violence for  
10 sentencing purposes under USSG § 4B1.2 in United States v. Cox, 74  
11 F.3d 189 (9th Cir. 1996). Section 4B1.2 defines a "crime of  
12 violence" as:

13 any offense under federal or state law punishable by  
14 imprisonment for a term exceeding one year that - (i) has  
15 as an element the use, attempted use, or threatened use  
16 of physical force against the person of another, or (ii)  
17 . . . otherwise involves conduct that presents a serious  
18 potential risk of physical injury to another.

19 USSG § 4B1.2(1). This language is not distinguishable from the  
20 definition of 18 U.S.C. § 16(b) in any material way, and to the  
21 extent that it is different, it is more narrow because section  
22 4B1.2(1)(ii) requires the "potential risk of physical *injury*"  
23 whereas section 16(b) only requires a "substantial risk that  
24 physical *force*" be employed. (Emphasis added). The Ninth Circuit  
25 reasoned that "[t]o ask someone to murder your wife for money  
26 involves a high degree of threat of physical force against one's  
27 wife." Cox, 74 F.3d at 190. See also United States v. Walker,  
28 181 F.3d 774 (6th Cir. 1999) (holding solicitation to commit

1 aggravated robbery is a crime of violence for sentencing  
2 purposes).

3 As is demonstrated by the cases above, Defendant's conviction  
4 for solicitation to commit murder in violation of California Penal  
5 Code § 653f(b) is a crime of violence under section 16(b).  
6 California Penal Code § 653f(b) states: "Every person who, with  
7 the intent that the crime be committed, solicits another to commit  
8 or join in the commission of murder shall be punished in the state  
9 prison for three, six, or nine years." Cal. Penal Code § 653f(b).  
10 Even conceding - as Defendant argues - that the crime of  
11 solicitation to commit murder is completed as of the moment when  
12 the solicitation occurs, the crime would nonetheless involve a  
13 substantial risk that physical force will be used in the course of  
14 committing the offense. On this point, the Supreme Court's  
15 decision in Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) is  
16 instructive. In Leocal, the Court discussed the meaning of  
17 section 16(b), explaining that the section:

18 covers offenses that naturally involve a person acting in  
19 disregard of the risk that physical force might be used  
20 against another in committing any offense. The reckless  
21 disregard in § 16(b) relates not to the general conduct  
22 or to the possibility that harm will result from a  
23 person's conduct, but to the risk that the use of  
24 physical force against another might be required in  
25 committing a crime.

26 Leocal, 543 U.S. at 10. The Court cited burglary as the classical  
27 example of a crime that would qualify as a "crime of violence"  
28 under section 16(b) because "burglary, by its nature, involves a  
substantial risk that the burglar will use force against a victim  
in completing the crime." Id. Thus, like the burglar who

1 necessarily disregards the risk that he will be required to  
2 intentionally cause substantial risk to the home's occupants,  
3 Defendant necessarily disregarded the substantial risk attendant  
4 to his solicitation of murder that physical force would be  
5 necessary against the person of another "in committing the crime."

6 Nor is it of any relevance that Defendant here contracted  
7 with an undercover police officer to kill his ex-wife. (Def.'s  
8 Mot. 1.) As Nq explained, a categorical analysis of the statute  
9 at issue renders the underlying facts irrelevant. See Nq, 436  
10 F.3d at 397. The solicitation of a murder inherently involves the  
11 substantial risk of physical force being used in the course of  
12 committing an offense regardless of whether the crime solicited is  
13 ultimately carried out. Accordingly, Defendant's conviction for  
14 solicitation to commit the murder of his ex-wife is a crime of  
15 violence under 18 U.S.C. § 16(b), and thus an aggravated felony  
16 under 8 U.S.C. § 1101(a)(43)(F).<sup>1/</sup>

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21 <sup>1/</sup>

22 Importantly, Defendant cites no case to dispute  
23 this conclusion. While the Ninth Circuit has found that  
24 crimes regarding solicitation to possess narcotics do not  
25 qualify as aggravated felonies, see Leyva-Licea v. INS, 187  
26 F.3d 1147, 1150 (9 th Cir. 1996), those cases are  
27 inapposite. Whether a drug crime qualifies as an  
28 aggravated felony turns on whether it is punishable under  
the Controlled Substances Act. The Controlled Substances  
Act does not mention solicitation crimes, nor does it  
contain a catch-all provision that could be read to cover  
solicitation crimes. See Leyva-Licea, 187 F.3d at 1150.

1        **B.     ADMINISTRATIVE REMOVALS ARE ACCEPTABLE FORMS OF REMOVAL, AND**  
2        **THE ADMINISTRATIVE REMOVAL OF DEFENDANT DID NOT VIOLATE HIS**  
3        **DUE PROCESS RIGHTS**

4        Defendant also argues that he was prejudiced by a lack of  
5        counsel at his administrative removal proceedings. However, the  
6        Ninth Circuit has consistently and repeatedly upheld the validity  
7        of expedited administrative removal proceedings where a defendant  
8        is unrepresented. Simply put, Defendant cannot establish that he  
9        was in any way prejudiced by his removal, and his motion should be  
10       denied.

11       The Ninth Circuit has made clear that "the full panoply of .  
12       . . . procedural and substantive safeguards which are provided at a  
13       criminal proceeding are not required at a deportation hearing."  
14       United States v. Solano-Godines, 120 F.3d 927, 960-61 (9 th Cir.  
15       1997). Therefore, there is no right to counsel at an  
16       administrative removal hearing. Lara-Torres v. Ashcroft, 383 F.3d  
17       968, 974 (9th Cir. 2004). Nonetheless, the Ninth Circuit has  
18       repeatedly held that absent a showing of a due process violation  
19       and prejudice, the Government may rely on a deportation pursuant  
20       to a Final Administrative Removal Order in prosecuting a defendant  
21       under 8 U.S.C. § 1326. United States v. Garcia-Martinez, 228 F.3d  
22       956 (9th Cir. 2000). Aggravated felons are subject to expedited  
23       administrative removal. See 8 U.S.C. § 1228(b); United States v.  
24       Hernandez-Vermudez, 356 F.3d 1011, 1012 (9th Cir. 2004).  
25       Proceedings under § 1228(b) are governed by 8 C.F.R. § 238.1.  
26       Under § 238.1, removal proceedings commence when the alien is  
27  
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1 served with the Notice of Intent in conformance with 8 C.F.R. §§  
2 103.5a(a)(2) & 103.5a(c)(2). See 8 C.F.R. § 238.1(b)(2)(I).

3 Here, the Notice of Intent, (Def.'s Mot., Exh. C), included  
4 notice to Defendant that he had the right to have counsel present  
5 at his administrative hearing. Whether Defendant chose to avail  
6 himself to counsel at his own cost was a decision purely his own.  
7 Nothing was done by the Government to deny him representation at  
8 his administrative hearing. Regardless, Defendant had no Sixth  
9 Amendment right to have counsel present at his administrative  
10 removal proceeding. Accordingly, Defendant's argument that he  
11 suffered a due process violation is unavailing.

12 **C. EXHAUSTION**

13 Finally, in order to successfully collaterally attack a prior  
14 removal order, a defendant must demonstrate that he exhausted his  
15 administrative remedies. United States v. Camacho-Lopez, 450 F.3d  
16 928, 930 (9th Cir 2006); see also 8 U.S.C. § 1326(d). However,  
17 because Defendant was convicted of an aggravated felony, he had no  
18 right to administrative review. 8 U.S.C. § 1252(a)(2)(C).  
19 Therefore, because Defendant did not have any right to  
20 administrative review, there is no way the deportation proceeding  
21 improperly denied him of that right. See 8 U.S.C. § 1326(d)(2).

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IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motion be denied.

DATED: March 3, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

s/ Peter J. Mazza  
PETER J. MAZZA  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
JOSE REYMUNDO  
CONTRERAS-HERNANDEZ,  
  
Defendant.

Case No. 07CR3190-JAH  
  
CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, PETER J. MAZZA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO AN INVALID DEPORTATION on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Candis L. Mitchell, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2008.

s/ Peter J. Mazza  
PETER J. MAZZA